UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS, MERGED BRANCH 19	Case No. 34-CA-012912

RESPONDENT'S BRIEF IN ANSWER TO COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS

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Respondent United States Postal Service, through counsel, in accordance with Section 102.46(d)(1) of the Board's Rules and Regulations, submits its answering brief.

INTRODUCTION

Counsel for the General Counsel (the "General Counsel") assails most of a 17-page decision in Case No. 34-CA-012912, wherein Administrative Law Raymond P. Green ("Judge Green" or "ALJ"), concluded, *inter alia*, that the General Counsel failed to sustain his burden of proving that multiple requests for documents were relevant to the statutory obligations of the National Association of Letter Carriers ("NALC" or "Union") or, if relevant, that the Postal Service unreasonably delayed in providing or failed to provide the relevant documents. The vast majority of the General Counsel's arguments, though carefully disguised, boil down to the General Counsel's questioning of Judge Green's credibility determinations, or the General Counsel's disagreement with facts that were not disputed during the hearing. These arguments must be rejected. *See* Point I.A, *infra*. The judge correctly concluded that the Union's explanations of the form's relevance were insufficient, *see* Point I.B, *infra*.

Because the judge concluded on various grounds that only one violation of the Act occurred at one location only, the ALJ determined that the General Counsel was not successful in meeting his heavy burden of proving that an extraordinary remedy in the form of a New-Haven wide order was warranted and ordered a posting at the Mt. Carmel location only. Assuming that the underlying ruling was somehow incorrect, a New Haven-wide remedy is not appropriate here because, *inter alia*, the alleged violations at issue at the Mt. Carmel and Dixwell Avenue locations only were not "egregious," and the General Counsel has not demonstrated a proclivity to violate the Act on the part of the postal managers, supervisors and facilities located in New Haven, Connecticut. *See* Point II, *infra*.

STATEMENT OF FACTS

The vast majority of the facts set forth in the Agency's closing brief — and in ALJ Green's decision ("ALJD") — were undisputed by the General Counsel at the hearing of this matter.

ARGUMENT

I.

Judge Green's Finding that the Postal Service Did Not Violate the Act in any Manner Encompassed by the Complaint—Other than the One Failure to Timely Furnish TAC Ring Information in Relation to Friedman's December 17, 2010 Assignment — Should Be Upheld

The General Counsel's challenge to Judge Green's finding that the Postal Service did not violate the Act, with the one exception identified above, is as follows: (i) the General Counsel repeatedly claims that Judge Green's credibility determinations, despite the fact that the vast majority of facts presented by Postal Service and accepted by the judge were undisputed by the General Counsel, amount to the judge ignoring pertinent facts and arguments and relied on rationales unsupported by the evidence; (ii) the General Counsel contends that the judge made up defenses for the Postal Service that it never advanced; and (iii) the General Counsel contends that Judge Green "usurped the right of the parties' to make their own agreements and altered their grievances practices." GC Br. at 2.

A. The Board Should Affirm the Judge's Credibility Determinations and Findings

The General Counsel disagrees with Judge Green's credibility determinations and findings, using phrases such as "overstates" (GC Br. 3), "made an illogical leap" (*id.* 14), "reached a faulty conclusion" (*id.* 22), "misread the sequence of events" (*id.* 22), "an inventive leap" (*id.* 23) and "invented a defense" (*id.* 34) to describe the findings of the judge based on the testimony and evidence presented at trial, and claiming that the judge "ignored pertinent facts and arguments" (*id.* 2). As the judge stated:

> On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following findings and conclusions.

ALJD at 2. Absent clear evidence undermining the testimony accepted by the judge, the Board should adopt the credibility resolutions by the judge, who observed the demeanor of the witnesses as they testified throughout the hearing. This is even more true when the General Counsel did not provide any evidence conflicting with postal witnesses. "The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces [the Board] that they are incorrect." *United Steel Service, Inc.*, 351 NLRB No. 86 (Dec. 31, 2007) (citing *Standard Dry Wall Prods.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951)). As demonstrated below, and as noted throughout Judge Green's decision, the vast majority of the testimony with which the General Counsel takes issue was undisputed (*see, e.g.,* ALJD at 15:12), and the preponderance of the evidence supports the judge's findings and conclusions. Hence, the Board should reject the General Counsel's credibility-based "arguments" outright and affirm Judge Green's credibility determinations.

As for the General Counsel's assertions that the judge "made up" defenses that the Postal Service never advanced and "usurped" the right of the parties' to make their own agreements (GC Br. at 2), these assertions are of no consequence to the outcome of the case. ALJ Green, after properly setting forth the legal standard to be applied (ALJD at 2-3), determined that the Postal Service violated the Act in only one instance. The General Counsel has not contested the propriety of the legal standard set forth by the ALJ in his decision, only how the ALJ interpreted and applied the testimony and evidence presented at trial.

The General Counsel's mere dissatisfaction with the ALJ's interpretation of the evidence, however, is insufficient to support the GC's position regarding the exceptions. The Rules and Regulations of the NLRB specifically state that any brief in support of exceptions "shall con-

tain...the points...of law relied on in support of the position taken on each question." NLRB Rules and Regulations, § 102.46(c)(3). The GC's brief in support of the exceptions cites to governing law on only one page of the brief, page 16. The GC's citation of law, however, is not inconsistent with the legal standard set forth by the ALJ and, therefore, the GC's exceptions amount to nothing more than a disagreement with the manner in which the ALJ interpreted the evidence.

Furthermore, the GC has not met its burden of showing that the ALJ's factual findings were contrary to a preponderance of the evidence. NLRB Rules and Regulations, § 102.48(c). The GC sets forth nothing more than alternative arguments and conclusions that it wishes the judge had found based on the evidence presented.

B. The Judge Correctly Concluded that the Union's Explanations of the Documents' Relevance or Need Were Insufficient

Judge Green correctly concluded, with respect to the Emond grievance, the Express Mail grievance, the grievance regarding route time and the Gray-Williams overtime assignment grievance, that the General Counsel failed to meet his burden of establishing that the information is relevant or necessary to the Union's duties as bargaining representative.

As stated elsewhere, the GC has not contested that the ALJ properly set forth the governing law with regard determining relevancy or the need for certain documents. With regard to the Emond grievance, the GC merely asserts that the requested information "easily met the Board's standard of relevance." GC Br. at 16. The ALJ, however, based on the testimony and evidence presented at trial and, after reviewing the GC's closing brief, determined that the requested information was not relevant. ALJD at 8:10-12. Merely asserting that the ALJ could have reached a different conclusion based on the evidence is not sufficient to overturn his finding with regard to the Emond grievance.

With regard to the Express Mail grievance, the GC's assertion that the "judge's rationale is merely his own view about an agreement that he wishes the parties had made, but did not" (GC Br. at 34) is nothing more than an expression of the GC's dissatisfaction with the ALJ's findings regarding this portion of the complaint. The ALJ specifically found, based on six (6) days of testimony and dozens of exhibits, that the parties "by mutual agreement" held in abeyance the grievances underlying the requests for information and that the information would become irrelevant if the Union lost the "representative" arbitration case. ALJD at 9:24-26. The undisputed agreement made by management and the Union to hold the remaining grievances in abeyance was an agreement made by the parties rather than a rationale or agreement that the ALJ created. The ALJ found that, "given the fact that the parties had a great number of other grievances to deal with...that it is not unreasonable for either the Employer or the Union to prioritize their grievance handling efforts." ALJD at 9, 49-51.

With regard to the grievance regarding route time, the GC merely asserts that the "judge reached a faulty conclusion because he misunderstood some facts and lost sight of others" (GC Br. at 22) is not sufficient to overturn the ALJ's finding that, after the grievance underlying the original request for information was withdrawn, the Union did not make it known to management that it nevertheless wanted the requested information to investigate the merits. ALJD at 11:4-6. The GC assertion that "it is an inventive leap for the judge to conclude that there is no indication that prior to February the Union still wanted the information—of course it did, there was absolutely no reason for Respondent to doubt that" (GC Br. at 23) is merely a conclusory statement without any reference to testimony admitted into evidence that supports the assertion. The GC's desire for a different result with regard to this part of the complaint is not sufficient to overturn the findings of the ALJ that were made after hearing six (6) days of testimony, reviewing several dozen exhibits and reviewing the GC's 122 page closing brief.

With regard to the Gray-Williams overtime assignment grievance, the GC's assertion that the judge's finding "fails to recognize that the parties' elaborate grievance procedure...relies heavily on a documented record at Formal Step A and Formal Step B" (GC Br. at 40) is belied by the evidence. Based on the testimony and exhibits presented at trial, the ALJ set forth a lengthy description of the governing provisions of the collective bargaining agreement and how those provisions worked. ALJD at 4-6. If the ALJ did not understand the need for a heavily documented record after six (6) days of testimony, the submission of dozens of exhibits and the submission of a 122 page closing brief, the reason for this misunderstanding may be that the GC failed to present any evidence to support this claim, which may also explain why the GC does not include a citation in its brief to support this claim.

C. The Judge Correctly Concluded that the General Counsel Failed to Prove that the Postal Service Unduly Delayed in Providing Information

Judge Green correctly concluded, with respect to the Friedman December 20, 2010 grievance and the Gray-Williams "Warning" grievance, that the General Counsel failed to meet his burden of establishing that the Postal Service unduly delayed in providing the requested information. With respect to the Friedman December 20, 2010 grievance, the GC objection to the ALJ's finding appears to be a quibble with the ALJ's credibility determinations regarding this portion of the complaint.[1] GC Br. at 37-39. The ALJ specifically found that the Postal Service's furnishing of the information on January 20 and 21 was not unduly late. ALJD at 12:43. The GC does not cite to the record or any case law to support the impropriety of the ALJ's finding in this regard. As such, the ALJ's finding with regard to the Friedman December 20, 2010 grievance should be upheld.

[1] The GC appears to use this portion of his brief to attack the ALJ's findings on other issues and presents very little argument, and no facts, to support why the ALJ's decision with regard to this particular part of the complaint should be overturned.

With respect to the Gray-Williams "Warning" grievance, the GC takes issue with the ALJ's finding that the evidence does not show an unreasonable delay in furnishing the information. ALJD at 14:7-8. Once again, however, the GC does not point to any facts or law that would undermine the ALJ's finding in this regard. GC Br. at 35-36. The GC's assertion that Supervisor Joseph did not specifically attribute the delay to the Christmas holidays or the staffing shortages in the office (GC Br. at 36) is non-sensical. Given a staffing shortage and the increase in work around the holidays, it necessarily follows that the supervisor would have less time available to respond to requests for information. In fact, the ALJ specifically found that part of the delay was attributable to the Christmas/New Year holidays and the fact that Supervisor Joseph was responsible for mail delivery in an undermanned office. As such, the ALJ's finding with regard to the Gray-Williams "Warning" grievance should be upheld.

II.

The General Counsel Has Not Met His Heavy Burden of Establishing that a New Haven-Wide Order Covering Multiple Facilities Is Necessary and Justified

In the event that the Board determines, contrary to Judge Green's decision and the Postal Service's position, that the Postal Service has violated the Act, the General Counsel's request for a special or extraordinary remedy should be denied. Rather than seeking to limit the posting remedy to the facilities at issue, the Mt. Carmel and Dixwell Avenue locations, the General Counsel seeks — based on seven instances of a delay in providing or failure to provide the Union with relevant documents[2] at these two locations only — a New Haven-wide order, a posting at the main, branch and station facilities in the New Haven, Connecticut Post Office and to send

[2] The General Counsel repeatedly amended and abandoned claims against the Postal Service before the trial, during the trial and after the trial. *See* Amended Complaints and ALJD re claims abandoned. Having abandoned multiple claims that the Postal Service unreasonably delayed in providing or failed to provide documents to the Union, the GC is left with only seven instances of alleged violations at the Mt. Carmel and Dixwell Avenue locations. GC Br. at 1-2.

a copy of the Order to all of the supervisors at the aforesaid facilities. GC Br. at 41. This request is based on (a) the Postal Service's alleged failure "to meet commitments it made in a prior formal settlement involving other New Haven Post office branches"; (b) the "extensive interchange of Respondents' supervisors and managers among the different New Haven Post Office branches, as well as some interchange of employees"; and (c) "Respondent has a history of recidivism nationwide with respect to failures to supply information." GC Br. at 41.

Since the remedy requested goes far beyond the traditional remedy, the Board bears a heavy burden in supporting this remedy. To justify a special or extraordinary remedy, the General Counsel must prove "that the Respondent's information request violations were . . . numerous, pervasive and outrageous" and that "the Board's traditional remedies will not sufficiently ameliorate the effect of the information request violations committed by the Respondent." *Albertson's, Inc.*, 351 NLRB No. 21, 2007 WL 2891096, at *8 (Sept. 29, 2007). The remedy must be "supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e). The General Counsel has not come close to satisfying that heavy burden here.

The alleged violations at issue here concern the Postal Service's response in seven instances where information was requested, GC Br. at 1 and 2, at two postal locations, the Mt. Carmel and Dixwell Avenue facilities. No dispute exists that the Postal Service properly and timely responded to many other information requests that were pending during the same time period. The alleged violations cannot be fairly characterized as egregious or widespread.

Therefore, rather than relying on the limited nature of the violation at issue here, the General Counsel instead relies on a prior formal settlement with respect to alleged failures to supply information at three locations in New Haven (Westville, Amity and Allingtown) that are different than the locations at issue here (GC Br. at 41) and four (4) prior cases, the most recent of which was decided in 2008, alleged at various postal facilities located in diverse parts of the

country. GC Br. at 45. For example, the GC cites *United States Postal Service*, 339 NLRB 1162, 1163 (2003), but this case involved a failure to timely provide information in Houston, Texas in late 2001 and early 2002. These cases are largely irrelevant, as none of them concern the facilities at issue here. And, when the totality of circumstances is considered, those cases plainly do not demonstrate an "extensive history of . . . violations of the Act" or a proclivity to violate the Act, but rather show an extensive history of compliance. Over the past two and a half decades, the Postal Service has routinely provided information to its unions — which make between 500,000 to one million requests per year, a vast majority of which are fulfilled properly. Thus, in the period covered by the General Counsel's citations, the Postal Service fulfilled over 12 million requests.

The Postal Service's decentralized organizational structure makes the decisions listed even more irrelevant and insubstantial. "'[T]he Postal Service is a massive, far-flung and decentralized operation.'" *Postal Service*, 477 F.3d 263 (5th Cir. 2007) (quoting, and denying enf. of broad order in, *Postal Service*, 345 NLRB No. 25, 2005 WL 2102982, at *7 (Aug. 27, 2005) (dissenting op.)). The Postal Service's longstanding, positive relationship with its unions makes any negative inference drawn from the cases and settlement references improper. Generally, in ascertaining an employer's history of compliance with the Act, it is necessary to examine that employer's long course of conduct with respect to unions. Indeed, company- or district-wide orders are confined to those employers that have demonstrated a scheme or design to deny employees their fundamental right under the Act. *Compare Tradesman Int'l, Inc.*, 351 NLRB No. 27, 2007 WL 2934953, at *8 (Sept. 29, 2007) (corporate-wide remedy justified because central management set corporate-wide tone encouraging unlawful activity and corporate "raison d'etre" was screening out union adherents); *with Darden Restaurants, Inc.*, 327 NLRB 5, 5 n.2 (1998) (order requiring posting outside of facilities at issue improper where insufficient evidence produced

showing violations "were part of an established corporate policy or that employee at other[] . . . facilities were likely to become aware of them").[3] In this case, however, the Postal Service has enjoyed a successful collective bargaining relationship with the Union, and other postal unions, for over three and a half decades, during which it has successfully negotiated, *inter alia*, employee wage rates and working conditions.

The remoteness in time of many of the underlying violations at issue in the decisions significantly decreases their probative value. In order to determine an attitude and a course of conduct relative to a propensity to violate a statute, it is necessary to examine contemporaneous actions, not just those that occurred in the distant past. Prior events lose probity vis-à-vis predicting future events with the passage of time. The Board has held that where there is no evidence of a previous violation at the facility at issue and the only "violations occurred 4 to 10 years ago" at other facilities, they are "too remote" to justify extraordinary relief. *Postal Service*, 314 NLRB 227, 227 (1994) (citing *Overnite Transp. Co.*, 306 NLRB 237, 237 n.4 (1992)). It is one thing if an employer has pervasively violated the Act within a short, contemporaneous period of time, but entirely something else if violations occurred many years ago and in different locales throughout the country.

As for the GC's argument regarding the "extensive interchange" of employees among the different New Haven branches (GC Br. at 41), the GC is asserting facts not presented at trial.

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[3] *See also Postal Service*, 350 NLRB No. 43, 2007 WL 2220270, at *9 n.3 (July 31, 2007) (finding that district-wide posting inappropriate and limiting posting to facilities involved); *The Earthgrains Co.*, 2007 WL 594541, at *23 (Feb. 22, 2007) (denying request for posting remedy involving 50 locations even though employer had prior instance of unlawful conduct because traditional remedy limited to facility at issue adequate); *Beverly Enterprises, Inc.*, 341 NLRB 296, 308 (2004) (request for nationwide posting denied where unfair labor practice involved only four facilities and there was no showing that normal posting requirements would be inadequate); *Beverly Enterprises*, 310 NLRB 222 (1993), enf. denied in relevant part 17 F.3d 580 (2d Cir. 1994) (corporate-wide posting required where broad pattern of violations directed by central management).

Other than establishing that Soto previously worked at the Westville location (ALJD at 3:48-50), the GC has not established that either of the other supervisors involved in this complaint (Bernardo and Joseph) worked at the locations covered by the prior settlement agreement. Furthermore, if the GC's argument of "extensive interchanged of employees" is taken to its logical conclusion, such an argument may require a nation-wide posting as the Postal Service is a nation-wide employer and employees move frequently among different Postal Service locations.

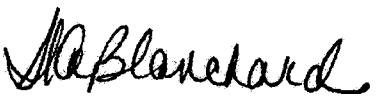
For the above reasons, inferences based on four (4) other cases arising throughout the country at other post offices or a settlement agreement covering locations in New Haven other than those identified here, do not show an extensive history of violations of the Act, especially given the massive size of the Postal Service and the several hundreds of thousands of information requests it fulfills annually. Thus, the General Counsel has not shown that an expansive order covering all New Haven facilities is justified.[4]

[4] If the Board concludes (contrary to the Postal Service's position) that the Postal Service's Dixwell Avenue facility violated the Act by not timely providing or failing to provide relevant information, any order and posting should be limited solely to that facility. *See Postal Service*, 345 NLRB No. 26, 2005 WL 2102983, at *3 n.3 (Aug. 27, 2005) (modifying city-wide posting order to cover only three facilities at issue and noting that such limited posting "will insure that all employees who were affected by the Respondent's unfair labor practices will have an opportunity to read the notice"), enfd. 486 F.3d 683 (10th Cir. 2007).

CONCLUSION

For the foregoing reasons, the Postal Service respectfully requests that the decision of Judge Meyerson dismissing the Complaint be upheld in its entirety. In the event that the Board disagrees and finds a violation of the Act, the Postal Service requests that any remedy be limited to the only facility at issue, the Phoenix P&DC.

Respectfully submitted,



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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

UNITED STATES POSTAL SERVICE and AMERICAN POSTAL WORKERS UNION, PHOENIX METRO AREA LOCAL, AFL-CIO.	Case No. 34-CA-012912

CERTIFICATE OF SERVICE

I certify that the foregoing Respondent's Brief in Answer to Counsel for the General Counsel's Exceptions was served on May 25, 2012, on the following:

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